IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a Corporation, and KATALLA COMPANY, a Corporation,
Plaintiffs in Error,

vs.

DANIEL S. REEDER,
Defendant in Error.

No. 2299

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE TERRITORY OF ALASKA THIRD DIVISION.

Brief of Plaintiffs in Error.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT and
LAWRENCE BOGLE,

Attorneys for Plaintiffs in Error.

610 Central Building,
Seattle, Washington.

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Brief of Plaintiffs in Error.

This cause comes here on a writ of error sued out by the defendants below to reverse a judgment rendered against the said defendants in the court below, in an action at law for the recovery of damages for personal injuries alleged to have been sustained by plaintiff (Defendant in Error), by reason of the alleged negligence of defendants. For convenience in this brief the parties will be referred to

as designated in the court below.

The complaint (R. pp. 2-4) alleges that defendants are corporations duly incorporated, and doing business as common carriers in the District of Alaska, and were engaged in such business at all times therein mentioned.

That on August 7, 1911, and for some time prior thereto, plaintiff was in the defendants' employ as a carpenter upon the line of railway running from Cordova into the interior of Alaska, and working on said day by the direction of defendants in a certain tunnel on the railway. That on said day the timbers supporting the roof of the tunnel broke and gave way, and plaintiff was caught underneath the falling timbers and seriously injured. The allegations of negligence are as follows:

> "That the accident by which plaintiff was injured as aforesaid was caused by the negligent failure of the defendants to furnish the plaintiff with a reasonably safe place to work; that said place was unsafe and dangerous by reason of the negligent failure of the defendants to suitably timber and protect the workmen employed in said tunnel from the danger of cave-ins and falling of material constituting the roof of the bore of said tunnel. All of which was known to

the defendants, or by the use of reasonable diligence could have been known by them, but was unknown to the plaintiff."

The defendants answered separately. Defendant, Copper River & Northwestern Railway Company, admitted that it was a corporation doing business in Alaska as a common carrier at the time or times mentioned in the complaint, but it denied that at said time plaintiff was in its employ. It denied the other allegations of the complaint, and alleged affirmatively that if plaintiff was injured as alleged, his injuries arose out of and from risks incident to his employment and business, which he assumed; also that they were caused by the negligence of a fellow-servant, and by plaintiff's contributory negligence.

The separate answer of the defendant, Katalla Company, admitted that it was a corporation doing business in Alaska, but denied that it was doing business in Alaska as a common carrier, or that it was engaged as a common carrier at any of the times mentioned in the complaint. It admitted that plaintiff was in its employ on August 7, 1911, and had been for some time prior thereto, working as a carpenter in said tunnel. It denied the other allegations of the complaint, and alleged as affirmative

defenses, assumption of risk, contributory negligence and negligence of a fellow-servant.

The affirmative defenses in each of the answers were denied by replies.

The issues as defined by the complaint, answers and replies, came on for trial before Honorable Peter D. Overfield, Judge of said court, and a jury, on April 24, 1913. A verdict was thereafter rendered against both defendants for the sum of $5000.00. Defendants filed separate motions for a new trial which were denied, and judgment was entered by the court on the verdict in favor of plaintiff and against both defendants (R. p. 284).

There is little dispute as to the facts in the case and no dispute as to when and how plaintiff sustained his injuries. This accident occurred August 7, 1911, in the Chitina tunnel on the railway line of the Copper River & Northwestern Railway Company which ran from Cordova to and beyond the place plaintiff was injured, all in Alaska. This railway line had been operated for some time prior to the accident in question, for the purpose of carrying freight and passengers for hire. Several months before the accident, work was commenced re-timbering the tunnel by placing new tim-

bers or bents between the old ones, which were found too weak, the other ones being left standing. Plaintiff started to work as a carpenter some time in April or May, 1911, assisting in re-timbering the tunnel (R. p. 149), and continued at this work until some time in June (R. p. 150). About July 10th, a part of the tunnel caved in (R. p. 155), and about July 16th, plaintiff started to work again in the tunnel putting in these extra timbers or bents (R. pp. 49, 156). Plaintiff and three other carpenters were doing this work of setting up new timbers. Before setting up the new timbers the old mud sills under the upright posts of the tunnel were taken out, and the earth had to be excavated so that larger mud sills could be put in (R. pp. 77, 213, 215). These new mud sills had to be put in before the new bents could be set up. About four days before the accident, the carpenters having caught up with the excavating gang, went to work around the depot near the tunnel (R. pp. 50, 71). The morning of the accident, the carpenters went into the tunnel to commence the work of setting up four new bents, which would complete the work of re-timbering the tunnel. About a week before this, a 3 by 12 brace had been nailed across the segments of the four old bents still standing. This brace

reached down to the caps on top of the upright posts, and was for the purpose of binding these segments together so that the pressure of the earth upon these segments would be distributed over all four instead of on one segment alone, and prevent them giving way under the pressure (R. pp. 80, 82, 216-218).

Before the new bents could be set up it was necessary to cut daps in the plates of the old bents, and the carpenters were sent into the tunnel this morning to cut these daps (R. pp. 51, 174). As soon as the carpenters reached the tunnel one, John Sutton, one of the four men, who with witness Likits was working on the other side of the tunnel opposite plaintiff, about fifteen feet away (R. p. 176), started to pull off this brace which was in the way of cutting these daps. Likits told Sutton to leave the brace alone, that he should see the foreman before he took it off, but Sutton answered that it would hold up any how, and proceeded to pull the brace off (R. pp. 83, 107, 110, 200). About ten minutes later the top of the tunnel over these four old bents which were being strengthened, fell in, killing Sutton and injuring the plaintiff (R. p. 108).

Some of the testimony tended to show that the pulling of the brace off these bents allowed the

pressure of the earth to fall on each segment separately, causing them to give way, permitting the top of the tunnel and earth above to cave in (R. pp. 201, 219). Other testimony tended to show that when the earth was excavated for the new mud sills, the earth which had been pressing against and holding the bevel joints of the segments and upright posts, fell down, and then there being nothing to hold these joints except the bevel, the pressure from above caused the segments to slide over the bevel of the post, and allowed the top of the tunnel to fall in (R. pp. 72, 98, 99, 123, 124, 207). There was some testimony to show that other portions of the tunnel had been braced by plaintiff and other carpenters during the work of re-timbering by putting posts in the middle of caps which had broken (R. pp. 113, 114, 156, 165, 166, 182, 206), and it was claimed and will probably be claimed here, that the failure to put such posts between these four bents was the cause of the accident. It is undisputed, however, that these four bents did not fall until after this brace was torn off, and the excavation made for the mud sills (R. pp. 88, 89, 94), and defendants offered considerable testimony which was undisputed, showing the precautions which were taken to prevent these bents giving or falling in during the progress of the work (R. pp. 212-223).

The testimony in behalf of plaintiff showed that there were plenty of timbers convenient which could have been used to protect these bents from falling, if plaintiff and those working with him in strengthening this tunnel at this place considered it unsafe (R. pp. 94, 115); and plaintiff knew just what precautions had been taken to prevent the old timbers falling, and knew what work was being done, and how it was being done, and that it was necessary to work in this manner (R. pp. 113, 124, 158, 159, 165, 168, 183, 185, 206, 221, 228). There is no evidence or claim that plaintiff ever objected either to a lack of other protection on the work that was being done, or the way it was being done, or that he ever asked that anything further be done to prevent a cave-in, or that he was promised that anything further or different would be done. Plaintiff testified that he watched the tunnel up to the time he left, "and it was considered at that time perfectly safe" (R. p. 50). He also testified that after they had excavated at the bottom of the posts, there was nothing to prevent the dirt back of the segments running down outside of the lagging, taking the strain off these segments so that the joint could slip by, but that at the time he temporarily left the tunnel four or five days before his injury, there was nothing to indicate

that it was a particularly dangerous place to him (R. p. 124). Plaintiff was an expert carpenter (R. pp. 146-149). There is nothing to show any changes in the condition of the work or the braces or guards against a cave-in, after the time plaintiff left the tunnel to go to work at the depot, until the excavating gang had gotten out the dirt so that the new mud sills could be placed in these four bents, except the work of these excavators, and on the other hand, witness Likits could not notice any changes during that time (R. pp. 204, 206). The work of putting in these four new bents could have been completed on the day of plaintiff's accident (R. pp. 209, 210).

At the close of plaintiff's evidence, each defendant moved the court for a non-suit in its favor (R. pp. 23, 25, 196). The motion of the Katalla Company was on the grounds that plaintiff had failed to establish that the Katalla Company was a common carrier at the time plaintiff was injured, or was doing a common carrier business over the railway line where plaintiff was injured; that the action was brought under the Federal Employer's Liability Act, which is in derogation of common law, and that plaintiff could not recover against the Katalla Company for failure to establish that that Company was such a common carrier. Also on the ground that the

evidence conclusively showed that plaintiff was employed in re-timbering and strengthening the tunnel for the purpose of making it safe, and that he was injured by reason of one of the hazards incident to his work, which he knew. Also that he was injured through the act of his co-laborer in knocking off the brace, and that he had failed to establish any case against the Katalla Company.

The motion of the Copper River & Northwestern Railway Company was on the grounds that plaintiff had failed to show he was in the employ of that Company at the time he received his injuries; also that he had failed to show that said Railway Company was doing a common carrier business at the time and place plaintiff was injured, and that the action was based on the Federal Employer's Liability Act; also that plaintiff was employed and engaged in re-timbering, strengthening and making an unsafe tunnel safe, which he knew, and that he was injured by reason of one of the risks incident to his work, and on the further ground that it was not shown that the Railway Company had failed or neglected to suitably timber the tunnel as alleged, and that plaintiff had failed to establish any case against that defendant.

Both of these motions were denied by the court, which stated:

> "In refusing this non-suit, I would say that if Reeder had been working those last four days there—had been working along on day shift and had returned the following morning, with all the knowledge he has shown here, I would grant the non-suit, but from the very fact that he was away those four days, whether there was a burden then on the Railroad Company to have done certain work those four days, whether they did it or not, or how they did it, I believe are questions for the jury. I say that eliminating the Acts of 1906, 8 and 10.
>
> "The motion being filed separately for each defendant, the ruling is separate as to each motion and exception allowed each defendant."

At the close of all the evidence, each defendant moved the court for a directed verdict in its favor (R. pp. 27, 29, 232). These motions were based upon the same grounds stated in their motions for non-suit. Both motions were denied and defendants duly excepted and their exceptions were allowed.

Thereupon, the court instructed the jury as to the law in the case. Both plaintiff and defendants

requested the court to instruct the jury that the action was brought under the Federal Employer's Liability Act (R. pp. 250, 273), but the court refused to do so, not even mentioning that Act in its instructions nor the rules of law applicable to such a suit under that Act (R. pp. 232-244). After the verdict, defendant, Copper River & Northwestern Railway Company, made a separate motion for a new trial upon grounds substantially the same as those shown in its motions for a non-suit and directed verdict, and also upon the grounds that the verdict was against the law and the evidence in the case and was excessive (R. p. 279).

Defendant, Katalla Company, also made a motion for a new trial upon substantially the same grounds (R. p. 281).

Both of these motions were denied, to which ruling defendants excepted and their exceptions were allowed.

The questions involved in this statement of facts and presented here by the Assignments of Error, together with the manner in which these questions are raised upon the record, are as follows:

I.

Plaintiffs in Error contend that as this action was brought under the Federal Employer's Liability Act, and as it is alleged and admitted that defendant, Copper River & Northwestern Railway Company, was a common carrier by railway in a territory, and as it appears that plaintiff was injured while employed on this railway line which had been used in the transportation of freight and passengers for hire, plaintiff could only recover against the Copper River & Northwestern Railway Company by proof that he was in the employ of that Company, and that the evidence wholly fails to show such employment.

That there was no evidence in the case to show that the Katalla Company was a common carrier by railway in Alaska, as alleged, and therefore that no recovery could be had against it under the Federal Act. That as the suit was based on the Federal Act and was a joint action against both defendants, and recovery could be had against the defendant Railway Company only under the Federal Act, and against the Katalla Company only under the common law, therefore the two actions could not be joined. That plaintiff could not sue both defendants jointly relying on both the common law and the

statute; that the joint judgment cannot stand under the pleadings and evidence in the case, and that the court erred in not holding as a matter of law under the pleadings and evidence, that the action must be dismissed as to one defendant or the other in any event.

These questions are raised on the record by Assignments of Error Nos. 8, 9, 25, 28, 35.

II.

Plaintiffs in Error contend that the evidence wholly fails to show any cause of action or right to recover against either defendant, for the further reasons:

(a) No right to recover against the Copper River & Northwestern Railway Company is shown because

1. Plaintiff did not show he was in the employ of that Company.

2. Plaintiff could only maintain the action against that Company under the Federal Act.

3. The evidence fails to show any negligence on the part of the Railway Company, either under the common law or the statute.

4. That the evidence shows as a matter of law that plaintiff assumed the risks involved in his employment and cannot recover either under the common law or the statute.

(b) No right to recover against the Katalla Company is shown because

1. It is alleged and admitted that plaintiff was in the employ of the Katalla Company at the time of his injury, and the action being a joint action against two defendants, based on the Federal statute, no recovery could be had against the Katalla Company without proof that it was a common carrier by railway within the Federal statute at the time of plaintiff's injury, and no sufficient proof of that fact was made.

2. The evidence fails to show any negligence on the part of the Katalla Company, either under the common law or the Federal statute.

3. The evidence does show as a matter of law that plaintiff assumed all risks involved in his employment, and cannot recover either under the common law or the statute.

These questions are raised on the record by the following Assignments of Error: 8, 9, 10, 13, 14, 16-24, 26-35.

III.

Plaintiffs in Error contend that the trial court committed numerous errors in the trial of the case in the admission of evidence and in giving and refusing to give instructions to the jury, which errors were highly prejudicial to both defendants, and because of which the judgment of the trial court should be reversed and a new trial granted in any event.

These questions are raised upon the record by the following Assignments of Error: 5, 6, 7, 11, 12, 28.

SPECIFICATIONS OF ERROR RELIED UPON.

5.

The court erred in permitting plaintiff to introdue Exhibits "C" and "D" and evidence regarding the Bill of Ladings, and in overruling the objection of plaintiff in error to said testimony, to which ruling plaintiffs in error duly excepted and exception allowed. The proceedings being as follows:

> Q. "I will ask you to examine a Bill of Lading that appears to be made out to you,

made out to McDonald & Reidy—that is one of the bills of lading made out to your firm."

A. "Yes, sir."

Q. "Did you do quite a good deal of shipping in 1910 and 1911?"

A. "We did considerable."

Q. "Is that a specimen of the sort of bills of lading you got?"

A. "Yes, sir."

Mr. Cobb: "I offer this in evidence."

Mr. Boryer: "I object to it for the reason that it is a Bill of Lading that purports to carry goods from Cordova to Miles Glacier, when this accident happened at Mile 131, some eighty miles beyond, a destination named in the bill of lading."

Mr. Cobb: "It is over a portion of the same road."

Mr. Boryer: "I think not."

By the Court: "If you connect it up it will be all right."

Q. "These goods were over the Copper River Railway?"

A. "Yes, sir."

By the Court: "It may go for what it shows, showing that shipments to Miles Glacier."

Mr. Boryer: "The reason I made that statement—because this road has been under construction. There were portions of this road that was constructed and trains were run over that portion of it. There were other portions that were not constructed, that is, it was partially constructed, temporary tracks were laid down but there was no hauling over the other portion of the road. There were licenses that were issued which is available to the plaintiff and issued for only a portion of the road and did not extend beyond certain points."

By the Court: "The objection is overruled; as far as the admission of this particular offer is concerned, it may be admitted for the purpose indicated by the court."

Mr. Cobb: "And one of the purposes is to show that the Katalla Company during the year 1911 was carrying on the business of common carrier by rail and was the railroad company."

Mr. Boryer: "I wish to make the further objection, for the reason that the bill of lading does not purport to be a bill of lading of the date that the accident happened to the plaintiff."

By the Court: "What is the date of it?"

Mr. Cobb: "May 4, 1911."

By the Court: "Proceed—it may be admitted."

Defendant allowed an exception.

The Bill of Lading is marked Plaintiff's Exhibit "C" and read to the jury by Mr. Cobb.

Q. "You say you received a great many bills of lading of which that is a specimen?"

A. "Yes, sir."

Q. "Did you receive that bill of lading also, for goods shipped?" (Hands witness paper.)

A. "Yes, sir."

Mr. Cobb: "We offer that in evidence also in connection with the witness' testimony."

Mr. Boryer: "We object to it for the reason that the receipt or paper purports to be a paper with its destination at Miles Glacier, Mile

49, and for the further reason that it bears the date of May 8—What date is that, Mr. Reidy?"

THE WITNESS: "May 3d."

MR. BORYER: "For the further reason that the bill of lading shows, or the paper, that it was issued on May 3, 1911, and is irrelevant and immaterial."

Objection overruled. Defendant allowed an exception. It is admitted as Plaintiff's Exhibit "D."

MR. COBB: "That is all."

6.

The court erred in permitting plaintiff to introduce Exhibits "E" and "F" and evidence regarding the Bill of Lading and in overruling the objection of plaintiff in error to said testimony, to which ruling plaintiff in error duly excepted and exception was allowed. The proceedings being as follows:

Q. "I hand you a bill of lading dated August 16, 1911, purporting to be dated Cordova, Alaska, and issued to O. M. Kinney and ask you if you ever saw that before."

A. "Yes, sir."

Q. "Was that issued to you?"

A. "Yes, sir."

Q. "And the goods shipped out on the line of the road?"

A. "Yes, sir."

Mr. Cobb: "We offer that in evidence."

Mr. Boryer: "We object to it for the reason that it is not the proper way of showing that the Defendant, Katalla Company, was a common carrier; for the further reason that the bill of lading shows that it was issued on the 16th day of August, 1910, and for the further reason that the goods were consigned to a point this side of the point where the accident happened."

Objection overruled. Defendant allowed an exception. It is marked Plaintiff's Exhibit "E" and admitted in evidence.

Mr. Cobb: "I am going to offer this one in evidence, of the same date."

Same objection; same ruling. Defendant allowed an exception. It is marked Plaintiff's Exhibit "F" and admitted in evidence.

Q. "That was issued to you, was it, in the due course of business?"

A. "Yes, sir."

Mr. Boryer: "I take it my exception goes to all this evidence."

By the Court: "Yes, sir."

Q. "I offer you some dated along in March, 1910, and ask you if that was issued to you?"

A. "No, sir."

Q. "Did you ship any goods out in 1911?"

A. "I think I did; yes."

Q. "Did you get the same kind of bill of lading, from the Katalla Company, operating the Copper River & Northwestern Railway?"

A. "I don't remember now—I shipped from the time the road started. I couldn't tell you what kind of bill of lading I got."

Q. "You have seen a great many of these Katalla Company bills of lading issued here?"

A. "Yes, sir."

Mr. Cobb: "That is all."

7.

The court erred in permitting plaintiff to introduce in evidence Bills of Lading marked Exhibits

"G" and "H" and in overruling the objection of plaintiffs in error to said exhibits, to which ruling plaintiffs in error excepted and exception was allowed. The proceedings were as follows:

> Q. (Mr. Cobb): "Did you have occasion during the year 1911 to ship any goods out over the line of the Copper River & Northwestern Railway?"

> A. "Not under the Northwestern Hardware Co.'s firm name—the firm's name was Feldman and Gerber in 1911—the firm name changed."

Q. "I will ask you if you ever saw this before (handing witness paper)."

A. "Yes, sir."

> Q. "Were these bills of lading issued for shipments on the Copper River & Northwestern Railroad?"

A. "Yes, sir."

Q. "Examine both of them."

A. "Yes, sir."

Q. "Freight paid on them?"

A. "Yes, sir."

Mr. Cobb: "We offer these in evidence."

By the Court: "They will be admitted and appropriat*ed* marked."

Mr. Boryer: "We ask for an exception to the ruling. Exception allowed." (They are marked Exhibits "G" and ".H")

8.

The court erred in denying the motion made by the plaintiffs in error at the close of the testimony for a non-suit of said action as to both defendants, to which each defendant excepted and exception was allowed. The motions were as follows:

> "Comes now the defendant, the Katalla Company, by its attorney, R. J. Boryer, and moves the court to grant a non-suit to this defendant, for the reasons:
>
> 1.
>
> That the plaintiff has closed his case and has failed to establish that the Katalla Company was a common carrier at the time that the plaintiff was injured, and failed to establish that the Katalla Company was doing a common carrier business over the line and at the place where the plaintiff was injured.

2.

That this action is brought under the Federal Employer's Liability Acts of 1906, 1908 and 1910, which is in derogation of the common law, and having failed to establish that the Katalla Company was doing a common carrier business at the time of the injury, to plaintiff and over the line at the point where the plaintiff was injured, cannot recover at common law in this action.

3.

For the further reason that the evidence in the case introduced by the plaintiff conclusively shows that the plaintiff was employed in retimbering and strengthening of the tunnel upon which he was working, for the purpose of making said tunnel safe, and that he was injured by reason of one of the hazards incident to his work which he knew while working on said tunnel.

4.

For the further reason that the evidence shows that the plaintiff was a co-laborer and a fellow-servant of the laborer who knocked the brace off of the frame-work of the tunnel, and that the knocking off of the brace in said tunnel

was the cause of the cave-in which injured the plaintiff.

5.

For the further reason that the plaintiff has failed to establish his case."

"Comes now the defendant, the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the court to grant a non-suit to this defendant, for the reasons:

1.

That the plaintiff has closed his case and has failed to show that the plaintiff was employed by the Copper River & Northwestern Railway Company, and has failed to show that the plaintiff was in the employ of the Copper River & Northwestern Railway Company at the time that he received his injury complained of in this action.

2.

For the further reason that the plaintiff has failed to show that the defendant, Copper River & Northwestern Railway Company, was doing a common carrier business at the time the plain-

tiff was injured as alleged in his complaint, and for the further reason that the plaintiff has failed to show that the Copper River & Northwestern Railway Company was doing a common carrier business over the line at the place where the plaintiff received his injury, and for the further reason that this action is based upon the Federal Employer's Liability Act as passed by Congress of United States in 1906, 1908 and 1910, which Act precludes a recovering at common law.

3.

For the further reason that the evidence shows that the plaintiff was employed at and was engaged in retimbering, strengthening and making an unsafe tunnel safe, which facts were admitted by the plaintiff to be known by him prior to the happening of his injury and was injured by reason by one of the risks incident to his work.

4.

For the further reason that the plaintiff has failed to show that this defendant failed and neglected to suitably timber the said tunnel so as to protect the workmen, by using old and

weaken timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon.

5.

For the further reason that the plaintiff has failed to establish his case against this defendant."

9.

The court erred in refusing to direct a verdict as to each and both of the defendants' motions for a directed verdict, to which defendants excepted and exception was allowed. The proceedings were as follows:

BY THE COURT: "The motions are denied in each case and exception allowed. I have these two questions in my mind that I will instruct the jury on, and it may be that I will have occasion to instruct the jury that there is not sufficient evidence for the defendants to be held as common carriers—I don't know about that."

"Comes now the Katalla Company, by its attorney, R. J. Boryer, and moves the court for a directed verdict in this action for the reasons:

1.

That the plaintiff has closed his case and has failed to establish that the Katalla Company was a common carrier at the time that the plaintiff was injured, and failed to establish that the Katalla Company was doing a common carrier business over the line and at the place where the plaintiff was injured.

2.

That this action is brought under the Federal Employer's Liability Acts of 1906, 1908 and 1910, which is in derogation of the common law, and having failed to establish that the Katalla Company was doing a common carrier business at the time of the injury to plaintiff and over the line at the point at which the plaintiff was injured, cannot recover at common law in this action.

3.

For the further reason that the evidence in the case introduced by the plaintiff conclusively shows that the plaintiff was employed in retimbering and strengthening the tunnel upon which he was working for the purpose of making said tunnel safe, and that he was injured by reason

of one of the hazards incident to his work which he knew while working on said tunnel.

4.

For the further reason that the evidence shows that the plaintiff was a co-laborer with and a fellow-servant of the laborer who knocked the brace off of the frame-work of the tunnel, and that the knocking off of the brace in said tunnel was the cause of the cave-in which injured the plaintiff.

5.

For the further reason that the plaintiff has failed to establish his case.

6.

For the further reason that the plaintiff has admitted that he was familiar with and knew all of the dangers incident to his work and by which he was injured."

"Comes now the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the court for a directed verdict in this action for the reasons:

1.

That the plaintiff has closed his case and has failed to show that the plaintiff was employed by the Copper River & Northwestern Railway Company, and has failed to show that the plaintiff was in the employ of the Copper River & Northwestern Railway Company at the time that he received his injury complained of in this action.

2.

For the further reason that the plaintiff has failed to show that the defendant Copper River & Northwestern Railway Company was doing a common carrier business at the time the plaintiff was injured as alleged in his complaint, and for the further reason that the plaintiff has failed to show that the Copper River & Northwestern Railway Company was doing a common carrier business over the line and at the place where the plaintiff received his injury, and for the further reason that this action is based upon the Federal Employer's Liability Acts as passed by Congress of the United States in 1906, 1908 and 1910, which acts preclude a recovering at common law.

3.

For the further reason that the evidence shows the plaintiff was employed at and was engaged in retimbering, strengthening and making an unsafe tunnel safe, which facts were admitted by the plaintiff to be known by him prior to the happening of his injury, and was injured by reason of the risks incident to his work.

4.

For the further reason that the plaintiff has failed to show that this defendant failed and neglected to suitably timber the said tunnel so as to protect the workmen, by using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon.

5.

For the further reason that the plaintiff has failed to establish his case against this defendant.

6.

For the further reason that the plaintiff has admitted that he was familiar with and knew all

of the dangers incident to his work and by which he was injured."

10.

The court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and exception was allowed:

Instruction excep*tion* to:

"You are first instructed that an employer of labor is obliged and bound to furnish a reasonably safe place in view of the circumstances of the labor or the work to be done, the surrounding circumstances, and maintain it as a reasonably safe place for the employees to work in."

11.

The court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and exception was allowed.

Instruction excepted to:

"Taking those two broad principles of law, your duty then will be to decide in this case, what was the cause of Mr. Reeder's injury,

about which there is no doubt or no contention —that is, the extent of the injury or accident may be a question for you,—what was the real, proximate cause of his injury."

12.

The court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and their exception was allowed.

Instruction excepted to:

"In my opinion law is common sense. We may differ sometimes as to what is common sense, the broad term,—so sometimes we may differ as to the law. Since I believe it to be founded on common sense, I am going to try to take you along with me in the reasoning of the law, as well as giving you the law in this case."

13.

The court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and their exception was allowed.

Instruction excepted to:

"It has been, it seems to me justly, held that if the proximate cause of an injury such

as this, was on the part of the employer of the labor, that the employer is liable. It has been held upon the other hand, that if the proximate cause of the injury was upon the plaintiff himself, Mr. Reeder in this case, or upon one of his fellow-workmen who were working with him, and through no fault of the defendants, then he could not recover. To illustrate what the law believe to be correct and what is common sense, I will give you two illustrations, founded upon two cases.

Imagine, if you will, that two men are working at this table, one facing this way and one this way and two men similarly working at that table over there, say upon tin or iron plate ware. One of the workmen would be standing with his back to an alleyway 10 or 12 feet wide and the other facing it. That it was the duty of those employed to stand here and do their work and perform their duties. While he was so working, two other men from some other part of the same room came along with a truck, we will say, a four-wheeled low-truck, with an ordinary handle, with a cross-piece at the end, that you see upon trucks around railroad freight stations outside, where the wheel works very

easily under the first axle. And while they were coming in with a load of tinware that was used upon the table in the ordinary course of business, one of the wheels, we will say, dropped into a little hole in the floor, a hole sufficient, a hole sufficiently large with *with* the load upon it to stop the truck for a moment, and the man at the tongue handle, or whatever you may call the steering apparatus by which he was pulling, kinder wiggled it as a man naturally would, attempting to pull the load from the hole, with the other man pushing behind the load. That while he was so wiggling and pulling and the other pushing to get it from the hole, a lot of tin or iron ware fell off the truck and injured this first man standing here with his back to that board and to that hole in the floor.

Now, in that case, although the plaintiff there and the boy or man standing here might have known of the hole, it is the law and was so held that even though he knew that, he did not as a part of his employment there have a right to assume or anticipate that he might be injured in the way he was by reason of that hole. That by reason of that hole being in the floor it was the duty upon the employer of these

men in that room to have remedied that hole and that, although probably the wiggling of the tongue on that load at that particular time caused the tinware to slip off the truck, the real cause, the proximate cause of that injury, was the defect in the floor.

The case of the opposite result, in which the actions of a fellow workman exonerated an employer of labor from an injury was that in which a common derrick was used, which consists, as you all know, I presume, of a boom and a mast, the mast being the upright piece and the boom goes off at an angle. In that instance men were employed to erect the boom and mast and when they were about completed, the base, which would probably be a long piece of wood, depending of course upon the size, length, etc., of the derrick, probably we will say the length of that rug and in dimensions proportionate to hold the load it was calculated to hold—that piece of wood had been placed in position and holes bored, through which iron bolts of sufficient size were to be put and the nuts screwed down, of course, to hold it in position. For some reason, either the bolts had been mislaid or had not been completed or something, on the completion of the work on a certain day, they walked away without putting those bolts in;

that was to be left to be completed on a subsequent day but before the derrick was to be used.

Now, is happened that the engineer who had control of the machinery running that derrick knew that, as well as the foreman and the man who was injured. The next day the foreman, who was a fellow-servant to the injured man, ordered an attachment to be made to a piece of stone and the engines to be started and the stone lifted by that derrick. The first pull did not succeed in lifting the stone. The foreman told him to go ahead and lift it; anyhow he made another pull and of course the bottom of the derrick, not being fast upon the resting piece as it should have been, it very naturally buckled out and gave way at the bottom and the boom of the derrick hit the plaintiff and injured him.

Now, the company in that case was held not liable because they claimed that the proximate cause in that case was the negligence of the foreman who knew that the bolts were not put in there and the company had done all they could to prevent them going ahead and using that derrick until it was fixed. That that was a risk that the company could not in reason have

apprehended would happen. They expected that the men would do what their good common sence would tell them to do and they had no right under those circumstances to anticipate that a man would so far forget and fail to do his duty as to start up and use a derrick before the bottom was fastened, and the man in charge in the erection of the derrick had ordered them not to so use the derrick."

14.

The court erred in failing and refusing to give to the jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that the plaintiff alleges in his complaint that the defendants' negligent acts consisted in the failure of the defendants to suitably timber and protect the workmen employed in said tunnel from the dangers of cave-in and falling of material constituting the roof of the bore of said tunnel, and said negligent acts consisted in the fact that the defendants failed and neglected to suitably timber said tunnel so as to protect the workmen by

using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon; therefore you are instructed that before the plaintiff can recover in this case he must establish by the preponderance of the evidence that the injury to plaintiff was caused by the defendants using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made so as to support the weight which would necessarily be imposed thereon."

16.

The court erred in failing and refusing to give to the jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find that the Katalla Company was at the time of the injury to the plaintiff doing a common carrier business at the point or place where plaintiff was injured, and that the plaintiff was working

for the Katalla Company, which work or employment consisted in repairing the tunnel or making the tunnel safe because it was in a dangerous condition, and the plaintiff knew it was in a dangerous condition, then you are instructed that the plaintiff assumed the ordinary risks and dangers of his employment that were known to him and those that might be known to him by the exercise of ordinary care and foresight and he cannot recover in this case."

17.

The court erred in failing and refusing to give to the jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if the plaintiff was engaged in repairing or strengthening or retimbering the tunnel that was in an unsafe condition and he failed along with his co-laborers to take precautions in bracing the timbers and the tunnel caved in by reason of the fact that the plaintiff along with his co-laborers failed or neglected to brace the timbers or failed to take any steps to prevent the cave-in while

they were working and the defendant had suitable timbers convenient which the plaintiff could have used to strengthen the timbers in the tunnel and prop the tunnel, and failed to do so, then you are instructed that the plaintiff cannot recover in this case."

18.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find from the evidence that the plaintiff's injury was caused by reason of the negligence of a coworker or fellow-servant of the plaintiff that he cannot recover in this action."

19.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find from the evidence that the Katalla Company was

doing a common carrier business at the time and through the tunnel where plaintiff received his injuries, and the plaintiff was engaged in and of making the tunnel safe by timbering said tunnel, or by strengthening the timbers of said tunnel, then you are instructed that the plaintiff by the acceptance of this employment assumes the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight and he cannot recover in this action."

20.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find from the evidence that the Katalla Company was not a common carrier at the time and place of the accident to plaintiff and that the plaintiff was engaged in work of making the tunnel safe to prevent caving in and falling of earth by timbering said tunnel or by replacing and strength-

ening the timbers of the tunnel, and while employed in this work he received his injury, you are instructed that the plaintiff assumes the hazards incident to such work and he cannot recover."

21.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find from the evidence that the Katalla Company was not a common carrier at the time and place where plaintiff was injured, and that the plaintiff was employed by the Katalla Company and was engaged in the repair of the tunnel that was unsafe, you are instructed that by the plaintiff accepting this employment he assumes the hazards incident to such work and cannot recover in this case."

22.

The court erred in failing and refusing to give to the jury the following instruction requested by

the plaintiff in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find from the evidence that the Katalla Company was not doing a common carrier business at the time and place where plaintiff received his injuries and the plaintiff was engaged in the repair of the tunnel to keep the dirt and earth from caving in and of making the tunnel safe, then you are instructed that the plaintiff by the acceptance of this employment assumes the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight and cannot recover."

23.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you do find from the evidence that the Katalla Company

> was not a common carrier when the plaintiff was injured, you are instructed that if the plaintiff was engaged in the work of making the tunnel safe, then you are instructed that the plaintiff assumed the ordinary and known dangers of the place and he cannot recover."

24.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

> "You are instructed that before you can find that the Katalla Company was at the time and place where the plaintiff was injured a common carrier, you must find from the evidence that the Katalla Company was at that time offering or holding itself out to carry goods for all persons who tendered or offered them the price of carriage, or find from the evidence that the Katalla Company was carrying goods for all persons who offered or tendered them the price for carrying same through the tunnel where plaintiff was injured."

25.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that the plaintiff has sued both the Katalla Company and the Copper River & Northwestern Railway Company, alleging that each of them are separate corporations, and that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Railway Company, therefore you are instructed that before you can find that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Company, you must find from the evidence that the relation of master and servant existed between the Katalla Company and the Copper River & Northwestern Railway Company at the time of the injury, and if you find that the relation of master and servant did not exist between the plaintiff and Katalla Company at the time of injury, then the plaintiff cannot recover against the Katalla Company,

and if you find the relation of master and servant did not exist between the Copper River & Northwestern Railway Company at the time the injury happened to plaintiff, then you cannot recover against the Copper River & Northwestern Railway Company."

26.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired for making it safe and the plaintiff was injured while assisting in either the work of repairing or fixing or causing the tunnel to be fixed so as to make it safe, then you are instructed that the law does not require of the defendant to furnish either a safe nor a reasonably safe place for the plaintiff to work, and if you find that the plaintiff was injured by the

necessary progress of the work in the repairing, fixing and strengthening of the tunnel, he assumed the risks and cannot recover in this action."

27.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired to make it safe and the plaintiff was injured by reason of one of his co-workers taking or knocking one of the braces off and that was the cause of the falling in of the timbers and earth which injured the plaintiff, then you are instructed that the plaintiff cannot recover in this action."

28.

The court erred in failing and refusing to give to the jury the following instruction requested by

the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find that the Katalla Company was not doing a common carrier business at the time that the plaintiff was injured, and also doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you are instructed that the plaintiff cannot recover in this action."

29.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that where a servant is employed to assist in repairing or opening up a tunnel which is in a bad condition and out of repair and not being used by a common carrier, the master does not owe to him the same duty to furnish a safe place as to that portion of its line out of repair and not being used as it does

to his servant engaged in the operation of trains upon the roadbed in the ordinary course of business, and he is therefore subjected to greater risks and perils than he would, under ordinary circumstances, and in entering this service to perform this work he assumes the hazards incident to the work and one of the hazards is the condition of the tunnel he is engaged to repair and you are therefore instructed that if the plaintiff was injured by reason of the caving in of the tunnel because of the fact that the tunnel was in a bad condition and the plaintiff was assisting in fixing or repairing this bad condition, then you are instructed that the plaintiff cannot recover."

30.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that the plaintiff is presumed to know of dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks, and if he does

not do this and is injured by reason of his failure to do so, then he cannot recover."

31.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that the plaintiff assumes the risks of all dangers that he has an opportunity to observe that are open, and that if the plaintiff accepted employment of the defendant in repairing or strengthening the tunnel for the purpose of making it safe and said tunnel was in an unsafe condition and needed repairing, that the plaintiff by accepting such employment assumed all the ordinary and usual risks and perils incident to such employment whether it was dangerous or otherwise."

32.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that the law requires a person, when doing a dangerous piece of work, to exercise such care for his safety as an ordinary prudent man would exercise under the circumstances, and unless he exercises such care and is injured by reason of not having exercised such care, he cannot recover."

33.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if the plaintiff had actual or constructive knowledge of danger of working at the point where the accident happened, and that a reasonably prudent man under the circumstances would exercise due care to avoid danger, and the plaintiff was injured by reason of his failure to use ordinary care, he is guilty of contributory negligence and cannot recover."

34.

The court erred in failing and refusing to give

to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if the plaintiff continued working with knowledge, actual or constructive, of dangers which an ordinary prudent man would refuse to subject himself to, he is guilty of contributory negligence and cannot recover."

35.

The court erred in denying the defendant's motion for new trial herein and in its order and judgment overruling said motions and granting judgment in favor of the plaintiff and against said defendants for the amount of the verdict found by the jury in favor of the plaintiff with costs, which order and judgment were duly excepted to by the defendants and exception allowed by the court; said motions were based on all the files, records and proceedings herein, and were made upon the following grounds specified therein and each thereof, to-wit:

1.

"Comes now the Katalla Company by its

attorney, R. J. Boryer, and moves the court for a new trial in this case for the following reasons:

That the plaintiff admitted in his evidence that at the time he was injured he was engaged in retimbering and strengthening the tunnel because said tunnel was in an unsafe condition; that he knew it was in an unsafe condition and testified in this case that his injury was received from an accident from the caving-in of the tunnel, which cave-in was caused by the faulty construction or joinder of the caps and segments supporting the roof of the tunnel. That he was familiar with and knew of the manner in which the caps and segments were constructed or joined, and that he repeatedly noticed the construction and joinder of the caps and segments, knew that they were dangerous, and, knowing these facts, admitted that he continued work without protest and admitted that he was injured by reason of the cave-in of said tunnel because of the improper constructions or joinder of said caps and segments, all of which were known to him at the time of the cave-in.

2.

For the further reason that said verdict is

against both the Copper River & Northwestern Railway Company and Katalla Company, and it was not shown in the evidence that the plaintiff was employed by the Copper River & Northwestern Railway Company at the time of his injury or that it was in any way connected with this defendant, Katalla Company.

3.

For the further reason that the verdict in this case is contrary to the law and instructions and evidence in the case.

4.

For the further reason that said verdict is excessive."

"Comes now the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the court for new trial in this case for the following reasons:

1.

That the plaintiff failed to show or prove by the preponderance of the evidence and failed in any manner to show that the plaintiff was ever in the employ of the Copper River & Northwestern Railway Company, and failed to show

that he was in the employ of the Copper River & Northwestern Railway Company at the time he received his injury.

2.

For the reason that the plaintiff has failed to show that the Katalla Company and the Copper River & Northwestern Railway Company are in any manner or way connected with each other or that the Copper River & Northwestern Railway Company or any of its agents were in any way connected with the work performed by the plaintiff at the time he was injured, and failed to show that the Copper River & Northwestern Railway Company either owned or was in any way connected with the line of road mentioned in plaintiff's complaint at the time of the injury to the plaintiff.

3.

For the further reason that the plaintiff admitted that he was familiar with the work that he was performing, knew that it was dangerous, knew of the construction of the cap and segment, which he claimed caused his injury, and knew of the danger of such cap and segment at the time he was injured and knew of, prior

to his injury, the dangers that caused his injury.

4.

For the further reason that said verdict is against the law and evidence of this case.

5.

For the further reason that said verdict is excessive."

ARGUMENT.

This Joint Action Cannot Be Maintained.

This action is based upon the Federal Employers' Liability Act. It could not be maintained against either defendant based upon both the statute and common law. If the Act applies to either defendant, it "supersedes all other common law and statutory liability on the part of such common carriers to such employees."

De Aitley vs. C. & O. R. Co., 201 Fed. 591.

See also:

Kelley's Administrator vs. C. & O. R. Co. et al., 201 Fed. 620;

Michigan Central R. Co. vs. Vreeland, 45 Sup. Ct. Dec. February 15, 1913, page 192;

Adams Express Co. vs. Croninger, U. S. Sup. Ct. Dec. February 15, 1913, page 148;

Winfree, etc., vs. N. P. R. Co., U. S. Sup. Ct. Dec. March 15, 1913, page 273;

Second Employers' Liability Cases, 223 U. S. 1.

While this statute is not mentioned in the complaint, nevertheless, it is there alleged that the defendants were "doing business as common carriers in the District of Alaska, and were engaged in such business at all the times hereinafter mentioned,"

and defendant, Copper River & Northwestern Railway Company admits this allegation as to itself. It was not necessary for plaintiff to expressly allege and rely on the statute. If the facts alleged and admitted or proven show that the statute applied, then the rights and liabilities of the party depended upon that statute whether plaintiff relied upon the statute in his complaint or not.

> "True, it is not distinctly alleged in the declaration that the action is based upon the Second Employers' Liability Act; but we think this effect must be given to the averments of the declaration that deceased met his death while in the employ of the company and while it was engaged in interstate commerce. Such averments rendered the federal act alone applicable, and further, the case was tried and disposed of below upon that theory."

Garrett vs. L. & N. R. Co., 197 Fed. 715.

See also:

Smith vs. D. & T. S. L. R. Co., 175 Fed. 506;
Cound vs. A. T. & S. F. R. Co., 173 Fed. 531;
Erie R. Co. vs. White, 187 Fed. 556;
McChesney vs. Illinois Central Ry. Co., 197 Fed. 85;

Kelley's Administrator vs. C. & O. R. Co., supra.

It follows, therefore, that as plaintiff was employed on a tunnel used in commerce by a railway in a territory, then if defendant, Copper River & Northwestern Railway Company, is liable at all, it could only be by virtue of the Federal Act.

The action is also based on the Federal statute as against the defendant, Katalla Company. The allegations against this company are the same as against the Railway Company, and plaintiff offered evidence for the purpose of proving that the Katalla Company was a common carrier by railway as alleged (R. pp. 116-122, 195-196).

Further, plaintiff requested the court to charge the jury in effect that the action is based on the Federal statute as to both defendants (R. pp. 250-254). In fact, the action could not be maintained against both companies unless based on the statute as to both, because being maintainable against the Railway Company only under the statute, an action against the Katalla Company under the common law could not be joined.

The case of *Kelley's Administrator vs. C. & O. R. Co., et al., supra*, was an action for damages for death, brought against the Railroad Company

and its employee, who was alleged to have been negligent in the matters complained of. The court held that the action could be maintained against the Railroad Company only under the Federal statute, and against the individual defendant only under the common law, because it is "limited to common carriers engaged in interstate commerce, and he is not such," the court saying:

> "What we have here, then, is two causes of action joined together in the same suit, one against the corporate defendant under the national statute, and one against the individual defendant under the state statute, and it may be accepted that they are improperly joined."

That this ruling is correct would seem to require no argument. It follows, therefore, that in order to maintain this joint action, the liability of both defendants must be based either on the statute or on the common law, and cannot be based as to both defendants on both the statute and common law, or as to one defendant on the statute and as to the other defendant on the common law.

The Act "is in derogation of the common law and must be strictly construed."

Fulghan vs. Midland Valley Co., 167 Fed. 660;

Johnson vs. S. P. R. Co., 196 U. S. 1.

The Act is available only when two facts appear: First, the offending carrier must at the time of injury be "engaged in commerce between any of the several states, etc."; (in this case in a territory), and, second, the injury must be suffered by an employee "while he is employed by such carrier in such commerce." Both these facts must be present or the Act does not apply—the carrier must be actually engaged in interstate commerce, and the employee must also be taking part therein.

Pederson vs. D. L. & W. R. Co., 184 Fed. 739.

While this case was reversed by the Supreme Court of the United States, it was on other grounds, and the rule above stated was recognized as correct; the same rule has been recognized in all of the decisions arising under this Act.

It follows, therefore, that unless there is sufficient evidence to show that the Katalla Company was a common carrier by railway in Alaska at the time of plaintiff's injuries, the joint action could not be maintained, and the joint judgment cannot be sustained.

Defendant Katalla Company denied in its answer that it was a common carrier by railway as

alleged in the complaint, and before plaintiff could recover against it under his complaint, or recover a joint judgment against both defendants, he was compelled to prove this allegation. The only evidence offered by plaintiff or in the case to prove this fact, is certain shipping receipts or bills of lading (Plaintiff's Exhibits "C," "D," "E," "F," "G" and "H," R. pp. 370-376), which were received over defendants' objection (R. pp. 117-119, 121-122, 196). These shipping receipts were dated respectively as follows:

Exhibit "C," May 4, 1911; Exhibit "D," May 3, 1910; Exhibits "E" and "F," August 16, 1910; Exhibit "G," March 21, 1911; Exhibit "H," March 29, 1911, all long before this accident.

The evidence of the shippers in connection with which these receipts were offered, was that they shipped goods over the railway line in question under these receipts at the date thereof. Neither witness knew or testified what company issued the receipts, but testified that the goods were shipped "over the Copper River & Northwestern line" (R. p. 160), or "over the Copper River Railway" (R. p. 170), or "over the line of the Copper River & Northwestern Railway" (R. p. 120), or "on the Copper River & Northwestern Railroad" (R. p.

196). There was no other testimony to show that the Katalla Company issued these bills, and so far as appears, the Copper River & Northwestern Railway Company may have issued them using the same blanks the Katalla Company might have used before turning the railroad over to the Railway Company, or that the Railway Company may have used blanks which had the name of the Katalla Company printed at the head, but which might never have been used by that company. In fact, the bills do not purport to be the bills of the Katalla Company, except that its name is printed at the top as "constructing and operating" the railway. There is not a particle of evidence that the Katalla Company issued these bills or even ever issued any similar bills, or that it carried any passengers or freight over the railway line, and especially there was no evidence to show that the Katalla Company was a carrier of freight or passengers over the railway line at the time and place plaintiff was injured. Certainly such evidence is not sufficient to bring the Katalla Company under the Federal statute, subjecting it to greater liabilities than it would have under the common law, and taking away many of its defenses.

Further, there was no suggestion in the evidence that *both* defendants were operating the rail-

way as common carriers at the time of plaintiff's injury, and that he was in the employ of both. The allegation and admission that the Railway Company was the common carrier at this time, in the absence of more evidence against the Katalla Company than was offered, certainly show that the Katalla Company was not such common carrier, and therefore this joint action could not be maintained or the joint judgment sustained.

It would seem to us beyond question that under the pleadings and evidence, the court was bound to grant the motion of one or the other defendant for a non-suit, or directed verdict or for a new trial on these grounds alone, and that it clearly erred in not giving defendants' instructions referred to in its 25th Assignment of Error.

Neither Defendant Is Liable Under the Federal Statute.

Section 2 of the Federal statute provides that a common carrier by railroad in a territory, shall be liable in damages to a person in its employ for injury "resulting in whole or in part, from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines,

appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment.''

Before plaintiff could recover against either defendant either under the Federal statute or common law, it was necessary for him to establish that he was in the employ of that defendant. He alleges in his complaint that he was employed by both defendants. The Railway Company denied that he was in its employ, while the Katalla Company admitted he was employed by it at that time. Plaintiff testified that he did not know which company he was employed by (R. p. 48), but admitted that he received his pay in checks issued and signed by the Katalla Company, which checks were identified and introduced in evidence (R. pp. 135, etc.). After plaintiff was injured he was taken to the Katalla Company's hospital (R. p. 192). Some of the men working with plaintiff did not know which company they were working for (R. pp. 39, 46, 48, 94, 102); while one of these four men testified that he was then working for the Katalla Company (R. pp. 55, 57, 63, 64).

There was some evidence that these men then had identification checks marked with a "C," but whether the "C" stood for Copper River & Northwestern Railway Company, or was merely a Katalla

Company's construction check, they did not know (R. p. 104). This evidence is certainly not sufficient to prove that plaintiff was in the employ of the Copper River & Northwestern Railway Company, at least that he was employed by the defendants jointly as alleged. On the other hand, we think it is established beyond doubt that he was then employed by the Katalla Company as alleged and admitted, and by that company alone. There is no claim or evidence of any agency existing between the two defendants; and no liability to plaintiff on the part of either defendant, by reason of such a relation, is or could be claimed. Again, the action can only be maintained under the statute against a common carrier by railroad in a territory, and we have shown that there is no evidence that the Katalla Company was such common carrier. It follows, therefore, that the action cannot be maintained against the Copper River & Northwestern Railway Company under the statute, because there is no proof plaintiff was in its employ, and cannot be maintained against the Katalla Company under the statute, because there is no proof it was a common carrier by railway in a territory, and subject to the Act.

But even if this action could be maintained against either company under the statute, no re-

covery could be had in this action under that statute for several reasons. In the first place, the statute gives a right of action only where the injury results in whole or in part "from the *negligence* of the officers, agents, or employees of the carrier, or by reason of a defect or insufficiency due to the negligence of the carrier, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment." The allegations of negligence in this case are that defendants negligently failed "to furnish the plaintiff with a reasonably safe place to work; that said place was unsafe and dangerous by reason of the negligent failure of the defendants to suitably timber and protect the workmen employed in said tunnel from the danger of cave-ins and falling of material constituting the roof of the bore of said tunnel. All of which was known to the defendants, or by the use of reasonable diligence could have been known by them, but was unknown to the plaintiff."

There is no allegation of any negligence on the part of any officer, agent or employee of either defendant, unless it was their negligence, as representing the master, in providing defective or insufficient appliances, tracks, roadbed or other equipment. It is not claimed that the accident was caused

by the negligence of Sutton in pulling off the brace, and in fact, plaintiff's witnesses gave it as their opinion that this was not the cause of the accident, but that it was caused by not properly protecting the rest of the tunnel from caving in while excavations were made under the mud sills and new bents were put in. Nor can the judgment be sustained upon the theory that the accident was caused by any negligence on the part of Sutton in pulling off this brace, because the evidence not only fails to show that it was negligence on his part to pull off the brace, but does show affirmatively that it was necessary for him to pull the brace off in order to cut the dap in the old plate to admit the new bents, which he and plaintiff and the other carpenters were engaged in erecting. Nor could a recovery be had on the ground of Sutton's negligence in this particular, without an instruction to the jury that they were to determine from the evidence whether or not the accident was caused by any negligence on the part of Sutton, or that it resulted during the progress of the work plaintiff was assisting in, and because of the necessary manner in which such work was being performed, all of which was known to plaintiff. In view of the allegations of the complaint and the testimony in behalf of plaintiff as to the cause of the injury, defendants were not

bound to request such an instruction, and certainly in the absence of any instructions to the jury on this question, a judgment cannot be sustained upon this theory.

There is no statute in Alaska requiring a master to do anything to protect an employee under these circumstances, and therefore the measure of the carrier's duty in that particular is the rule at common law. If there would have been no negligence in this case at common law, then there was no negligence under the statute. Neither defendant was an insurer of plaintiff's safety in doing the work he was employed to do. Neither defendant was guilty of any negligence in the matters alleged, unless it owed plaintiff a duty in that regard and failed to exercise reasonable care and forethought in performing that duty. Let us see what the duty of a master to an employee is in a case like the present one, and see whether or not either defendant failed to use reasonable care or forethought in performing such duty.

Plaintiff was employed to make a place safe which was then unsafe and known to him to be so. The very work plaintiff was engaged to perform was to remedy the defect which he now complains of, namely, the liability of the tunnel to cave-in. He

was an experienced man, of full age and having all his faculties, and cannot be heard to say that he did not know that this work was dangerous. In fact, his testimony shows conclusively that he was fully aware of the dangers of a fall of the old bents of the tunnel, which he was engaged in strengthening. There had already been a cave-in due to the weakness of these old bents, and on one occasion he with others had gone at night to put in temporary posts to prevent the old timbers giving way (R. pp. 165, 166, 182).

Under these circumstances we think the law is well settled that where the servant is hired for the express purpose of assisting in repairing a known defect, the safe place rule does not apply, and where the injury resulted from the unsafe condition which arose there, and was incident to the work thus undertaken by the servant, there is no liability. It is only where the injury arises from other defects which are known to the master and unknown to the servant that the rule can apply.

> *Labbatt's Master and Servant* (2nd Ed.), Sections 924, 1174, 1175, and cases there cited.

Further, there is no negligence on the part of a master where the injury arises during the progress of the work. In this case it is clear that the acci-

dent happened either because the brace was pulled off to enable the daps to be cut in the old plates to admit the new bents plaintiff was engaged in putting in, or, as most of plaintiff's witnesses testified, because of the removal of the earth below the old mud sills to make room for the new mud sills, which were necessary before the new bents could be set up. In either event, it necessarily arose during the progress of the very work plaintiff was assisting in, all of which work was necessary, the manner and necessity of doing which plaintiff well knew. Under these circumstances and the well settled rules of law applicable thereto, we do not think there was any negligence shown on the part of either defendant, and therefore no recovery could be had against either in this case.

> "There is a duty on the part of a master to provide his servants a safe place in which to work, but manifestly that principle is not applicable to a case like this, where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done."

Ry. Co. vs. Brown, 73 Fed. 970.

Where the place in which an employee was required to work, and where he was injured, was only

dangerous because of the negligence of his fellow workmen in carrying on the work, the risk from such danger was one which was assumed, and the master cannot be held liable for the injury.

Deye vs. Tool Co., 137 Fed. 480;
Armour vs. Hahn, 111 U. S. 313.

"As a general rule, it is the master's duty to furnish a reasonably safe place for his servants to work, but this rule has no application where the very work the servant is employed to do and assist in doing consists in making a dangerous place safe, and particularly where the dangerous character of the place is fully apparent, and known to the servant." (Citing cases.) "Where the servant, fully apprised of the dangerous character of a place, yard, building, or construction, is employed to assist in clearing up and making the same safe, and works therein for that purpose, he undoubtedly assumes the risks attendant, and in this respect the charge of the court was clearly erroneous."

Kansas City S. Ry. Co. vs. Billinslea, 116 Fed. 335, at 340.

"It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the serv-

ant may perform his service. *Railway Co. vs. Jarvi,* 53 Fed. 53, 3 C. C. A. 433, 10 U. S. App. 439. But this rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous, safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them."

Finalyson vs. Utica Mining & Milling Co., 67 Fed. 507.

It is no answer to say that other precautions might have been taken to present the cave-in. Even if the posts that had been used in other places in the tunnel had been put in here, there was no obligation on the part of either defendant to put them in, and there is no evidence from which the jury could say that it was negligence on the part of either defendant not to put in such posts. For all that appears in the evidence the weakness in these other cases, where the caps were broken, may have been much greater than that of the four bents in question, and the use of such posts may have strengthened these other bents, while they might not have added any strength whatever to the bents in question. In fact, there is nothing in the evidence from which the jury could say that the use of such posts in this case would have prevented the accident occurring, after the earth was excavated and the brace torn off during the progress of the work.

The undisputed evidence as to what precautions were taken to prevent a cave-in, and the fact that for more than a week these old bents, braced as they were, did not fall until the earth was necessarily excavated and the brace removed during the progress of the work, and in order to enable plaintiff to perform the work he was engaged to do,

proves conclusively, in the absence of any other evidence, there was no negligence in the matters alleged and relied upon.

No recovery could be had against either defendant under the statute for another reason. Section 4 of the Act of 1908 provides that in an action brought under the provisions of that Act, the "employee shall not be held to have assumed the risks of his employment, *in any case where violation by such common carrier of any statute enacted for the safety of employees, contributed to the injury or death of such employee.*" The court will note that Congress has recognized in this and the preceding section of the Act the clear distinction between contributory negligence and assumption of risk. In Section 3, it has taken away the defense of contributory negligence entirely, except that the employee's damages shall be diminished in proportion to the amount his negligence contributed thereto. But the statute has taken away the defense of assumption of risk only where the carrier has violated some statute enacted for the safety of the employee, which violation contributed to the injury.

This statute being in derogation of common law, must be strictly construed, and the court cannot read into the statute anything not clearly within its ex-

press terms. The rule of assumption of risk has its basis in the principles of the common law, and depends for its existence upon the relation of employer and employee existing between the parties. While some courts base the rule upon the maxim, "*volenti non fit injuria,*" the free translation of which is that he who prefers to remain in the presence of an obvious or manifest danger cannot recover for injuries resulting therefrom, other courts base the defense upon the contract of employment between the parties.

However, we do not think it necessary in this case to discuss whether the doctrine of assumption of risk is based upon contract, or the maxim, "*volenti non fit injuria,*" although we think this court is committed to the view that the defense is based upon contract.

> *Welsh vs. Barber Asphalt Paving Co.*, 167 Fed. 465.

But whether arising from contract or based on the maxim, we think it makes no difference in this case. If based upon contract, then the effect of the contract between the parties was that plaintiff contracted to do his work with reference to the tunnel being guarded as it was, which fact he well knew, and which he contracted should not be neg-

ligence on the part of his employer if left in this condition. He also contracted with reference to the manner in which this work should be performed, and that it should not be negligence on the part of his employer to perform the work in this way. On the other hand, if the defense is based on the maxim, then it clearly appears that he voluntarily continued in his employment well knowing what precautions had been taken to guard against the tunnel falling in, and as he made no complaint of this condition, and never requested that other precautions be taken, and was never promised that any should be, and did not himself take any other precautions, although there was plenty of material at hand which he might have used for that purpose, he willingly assumed all the risk of injury, because of the condition of the place where he was to do his work.

We do not think there can be any question but that the defense of assumption of risk under the Federal statute remains as it was at common law, except in the one instance named in the statute, namely, where the injury is caused by the violation of a statute for the employee's safety.

When we consider that Congress, in the Second Employers' Liability Act, undertook to cover the entire field so far as was desired, of the relation-

ship between carrier and employee, and in doing so took occasion to expressly designate the particular risks of injury which the employee should not assume, it logically follows that Congress meant to declare that the common law still remains in existence as to all other cases where the defense would be available in the absence of this statute. It cannot be claimed that Congress intended to repeal the entire common law in relation to assumption of risk, and unless it did so, the common law, except as modified by the express terms of Section 4 of the Act, is still in force.

The Supreme Court of Idaho, in the case of *Neil vs. Idaho & W. N. R. Co.,* 125 Pac. 331, 335, speaking through Mr. Justice Sullivan, says:

> "1. We will first determine whether said Act of Congress is applicable to the facts of this case.
>
> "That Act of Congress refers only to the inter-state commerce, abrogates the fellow-servant rule, extends the carrier's liability to cases of injury and death, and restricts the defense of contributory negligence and assumption of risk."

The learned judge, at page 336, indicates in

what manner the defense of assumption of risk has been restricted, saying:

> "Under the provisions of Section 4 of said Act, it is provided that the employee shall not be held to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the death or injury of such employee, and, as it is not claimed in this case that the company had violated any statute enacted for the safety of employees the defense of assumption of risk remains as at the common law."

The Supreme Court of Texas, in the case of *Freeman, Receiver, vs. Powell,* 144 S. W. 1033 (decided February 3, 1912), in which Mr. Justice Conner, speaking for the court, after quoting Section 4 of the Act of April 22, 1908, said:

> "It thus appears that under the Federal statute a complaining employee to whom the Act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee which has contributed to his injury or

death, and of this there is no contention in this suit."

We think our contention in this regard is also clearly recognized in the following cases:

Scott vs. C. R. I. & T. R. Co., 141 N. W. (Iowa) 1065;

Texas & P. R. Co. vs. Harvey, U. S. Sup. Ct. Dec. May 15, 1913, page 518;

Boston & M. R. Co. vs. Benson 205 Fed. 876;

Second Employers' Liability Acts, 223 U. S. 1.

"So far as risks are obvious, pertaining to the apparently permanent features of the business as it is openly conducted, an employer has a right to believe that his employee agrees to assume them. They are, therefore, not included among those to be guarded against in the performance of his general duty to furnish reasonably safe appointments for the employee, and the employer cannot be held guilty of negligence in failing to make provision against them."

Murch vs. Thos. Wilson's Sons & Co., 74 N. E. 111 (Mass.)

"There exists an exception to the general rule that an employee may assume that reason-

able care will be observed by his employer for his protection, which is that where a defect in machinery is known to an employee or is so patent and obvious as to be readily observable while engaged in his work, and he continues in the use and operation thereof notwithstanding the defect, he assumes the risk and hazard attending such use. The reason for the exception is that having such knowledge or possessed of the ready means of acquiring it and shutting his eyes to palpable conditions, he elects to engage in the service, and therefore to undergo the hazard on his own account."

Katalla Company vs. Rones, 186 Fed. 30.

"At common law a servant assumes the general risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception, that, where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of knowledge and without objection, with-

out himself assuming the hazard incident to such situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment, without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover."

Texas & P. R. Co. vs. Harvey, U. S. Sup. Ct. Dec., May 15, 1913, page 518.

"The workman assumes those risks of danger which are ordinarily incident to the work in which he is engaged, and those which are open and obvious to the senses, and which are known to him, if he continues in the occupation."

Pacific T. & T. Co. vs. Starr, supra.

"Plaintiff knew the very danger that he complains of as constituting the negligence of defendant, and it must be held as a matter of law that he assumed the risk."

Elmer vs. Mutual Steamship Co., 130 N. W. 1104 (Minn.)

NEITHER DEFENDANT IS LIABLE AT COMMON LAW.

We do not think any further argument is necessary to show that plaintiff could not recover

against either defendant under the common law. If there was no negligence under the statute, there certainly was none under the common law. If plaintiff assumed the risks under the statute, he certainly did so under the common law. If it could be said that the accident was caused by any negligence on the part of Sutton in pulling off the brace, it was the act of a fellow servant, for which neither defendant would be liable. But the action was not based on the common law and could not be maintained against the defendant Railway Company under the common law. Neither was it submitted to the jury under any proper instructions as to the rules of law applicable to such a case. Therefore, the judgment must be sustained by virtue of the statute or not at all.

Errors in Admission of Evidence.

Over the objections of defendants, the court admitted in evidence the shipping receipts marked Plaintiffs' Exhibits "C," "D," "E," "F," "G" and "H." These were admitted for the purpose of proving that the Katalla Company was a common carrier by railway in Alaska at the time of plaintiff's injury. As we have already shown there was no evidence even tending to prove that the Katalla

Company issued these bills, or ever issued any similar bills, or that it was at the time of the issuance of these bills or at any subsequent time, engaged in business as a common carrier upon this railway. It would seem to us not to require any argument to show that the admission of these receipts, without in any way connecting the defendant, Katalla Company, with them, other than the fact that its name was printed at the head of the bills, and not anywhere in the body, and without any other evidence to connect that company with these bills, was prejudicial error.

Errors in Instructions Given and Refused.

The court instructed the jury as follows:

> "You are first instructed that an employer of labor is obliged and bound to furnish a reasonably safe place in view of the circumstances of the labor or the work to be done, the surrounding circumstances, and maintain it as a reasonably safe place for the employees to work in."

Assignment of Error No. 10 (R. p. 324).

This instruction was not a correct statement of the law under the authorities we have already cited.

The court also instructed the jury as follows:

> "Taking those two broad principles of law, your duty then will be to decide in this case, what was the cause of Mr. Reeder's injury, about which there is no doubt or no contention —that is, the extent of the injury or accident may be a question for you,—what was the real, proximate cause of his injury."

Assignment of Error No. 11 (R. p. 324).

As this instruction was based upon the instruction last referred to, it was clearly erroneous, if the former instruction was incorrect.

The court also instructed the jury as follows:

> "In my opinion law is common sense. We may differ sometimes as to what is common sense, the broad term,—so sometimes we may differ as to the law. Since I believe it to be founded on common sense, I am going to try to take you along with me in the reasoning of the law, as well as giving you the law in this case."

Assignment of Error No. 12 (R. p. 324).

We think this instruction was clearly erroneous for the reason that it gave the jury to understand that the law of the case is "common sense," and that they might apply what they considered "com-

mon sense" in this case, rather than the rules of law as laid down by the courts.

The court also instructed the jury as follows:

> "It has been, it seems to me justly, held that if the proximate cause of an injury such as this, was on the part of the employer of the labor, that the employer is liable. It has been held upon the other hand, that if the proximate cause of the injury was upon the plaintiff himself, Mr. Reeder in this case, or upon one of his fellow-workmen who were working with him, and through no fault of the defendants, then he could not recover. To illustrate what the law believe to be correct and what is common sense, I will give you two illustrations, founded upon two cases.
>
> Imagine, if you will, that two men are working at this table, one facing this way and one this way and two men similarly working at that table over there, say upon tin or iron plate ware. One of the workmen would be standing with his back to an alleyway 10 or 12 feet wide and the other facing it. That it was the duty of those employed to stand here and do their work and perform their duties. While he was so working, two other men from some other

part of the same room came along with a truck, we will say, a four-wheeled low-truck, with an ordinary handle, with a cross-piece at the end, that you see upon trucks around railroad freight stations outside, where the wheel works very easily under the first axle. And while they were coming in with a load of tinware that was used upon the table in the ordinary course of business, one of the wheels, we will say, dropped into a little hole in the floor, a hole sufficient, a hole sufficiently large with *with* the load upon it to stop the truck for a moment, and the man at the tongue handle, or whatever you may call the steering apparatus by which he was pulling, kinder wiggled it as a man naturally would, attempting to pull the load from the hole, with the other man pushing behind the load. That while he was so wiggling and pulling and the other pushing to get it from the hole, a lot of tin or iron ware fell off the truck and injured this first man standing here with his back to that board and to that hole in the floor.

Now, in that case, although the plaintiff there and the boy or man standing here might have known of the hole, it is the law and was so held that even though he knew that, he did not

as a part of his employment there have a right to assume or anticipate that he might be injured in the way he was by reason of that hole. That by reason of that hole being in the floor it was the duty upon the employer of these men in that room to have remedied that hole and that, although probably the wiggling of the tongue on that load at that particular time caused the tin-ware to slip off the truck, the real cause, the proximate cause of that injury, was the defect in the floor.

The case of the opposite result, in which the actions of a fellow workman exonerated an employer of labor from an injury was that in which a common derrick was used, which consists, as you all know, I presume, of a boom and a mast, the mast being the upright piece and the boom goes off at an angle. In that instance men were employed to erect the boom and mast and when they were about completed, the base, which would probably be a long piece of wood, depending of course upon the size, length, etc., of the derrick, probably we will say the length of that rug and in dimensions proportionate to hold the load it was calculated to hold—that piece of wood had been placed in position and

holes bored, through which iron bolts of sufficient size were to be put and the nuts screwed down, of course, to hold it in position. For some reason, either the bolts had been mislaid or had not been completed or something, on the completion of the work on a certain day, they walked away without putting those bolts in; that was to be left to be completed on a subsequent day but before the derrick was to be used.

Now, it happened that the engineer who had control of the machinery running that derrick knew that, as well as the foreman and the man who was injured. The next day the foreman, who was a fellow-servant to the injured man, ordered an attachment to be made to a piece of stone and the engines to be started and the stone lifted by that derrick. The first pull did not succeed in lifting the stone. The foreman told him to go ahead and lift it; anyhow he made another pull and of course the bottom of the derrick, not being fast upon the resting piece as it should have been, it very naturally buckled out and gave way at the bottom and the boom of the derrick hit the plaintiff and injured him.

Now, the company in that case was held

not liable because they claimed that the proximate cause in that case was the negligence of the foreman who knew that the bolts were not put in there and the company had done all they could to prevent them going ahead and using that derrick until it was fixed. That that was a risk that the company could not in reason have apprehended would happen. They expected that the men would do what their good common sense would tell them to do and they had no right under the circumstances to anticipate that a man would so far forget and fail to do his duty as to start up and use a derrick before the bottom was fastened, and the man in charge in the erection of the derrick had ordered them not to so use the derrick."

Assignment of Error No. 13 (R. p. 325).

It would seem to us that no authority is necessary to show that this instruction was incorrect, and confusing to the jury, and gave no light as to the law applicable to the evidence in this case.

The defendants requested the court to give to the jury certain instructions which were refused, and which are set out in full in Assignments of Error Nos. 14 and 16 to 34 inclusive.

The argument we have already made in this brief, and the authorities heretofore cited we think show that each and all of these instructions were proper and should have been given. No similar instructions were given by the court, and we feel that the instructions which were given left the jury at sea as to what the law applicable to this case is, and that the court committed prejudicial error in refusing to give each and all of these requested instructions.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the trial court should be reversed and the action dismissed, or a new trial granted.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT and
LAWRENCE BOGLE,
Attorneys for Plaintiffs in Error.

No. 2299.

In the United States Circuit Court of Appeals for the Ninth Circuit.

COPPER RIVER AND NORTHWESTERN RAILWAY COMPANY, a Corporation, and KATALLA COMPANY, a Corporation,

Plaintiffs in Error,

vs.

DANIEL S. REEDER,

Defendant in Error.

Upon Writ of Error to the District Court for Alaska, Third Division.

Brief of Defendant in Error.

MOTION OF THE DEFENDANT IN ERROR TO STRIKE OUT CERTAIN PORTIONS OF THE TRANSCRIPT.

Now comes the defendant in error, by his attorney, Mr. J. H. Cobb, and moves the Court to strike from the transcript herein the following portions, to wit:

1st. Motion (of Katalla Co.) for nonsuit (R. 23, 24);

2d. Motion (of Copper River & N. W. Ry. Co.) for nonsuit (R. 24–26);

3d. Motion (of Copper River & N. W. Ry. Co.) for nonsuit (R. 27, 28);

4th. Motion of (Katalla Co.) for nonsuit (R. 29, 30);

for the reason that said papers are not embodied in any bill of exceptions, nor authenticated so as to be-

come a part of the record on writ of error, in this case, and should not have been copied into the transcript.

Defendant in error further moves the Court to strike from the transcript the following papers, to wit:

1st. Plaintiffs' request for instruction (R. 247–254);

2d. Instructions requested by the Copper River & N. W. Ry. Co. (R. 255–264);

3d. Instructions (requested by Katalla Co.) (R. 264–273);

4th. Defendant's exceptions to Court's instructions to jury (R. 273–277);

5th. Motion (of Copper River & N. W. Ry. Co.) for new trial (R. 279, 280);

6th. Motion (of Katalla Co.) for new trial (R. 281, 282);

for the reason that none of said papers are embodied in any bill of exceptions, or otherwise authenticated so as to become a part of the record on writ of error, and in the absence of such authentication, such papers are not properly a part of such record, and should not be copied into the transcript.

Defendant in error further moves the Court to strike out the document, or paper, entitled "Transcript of Testimony, etc.," beginning on page 33 of the transcript and ending on page 244, for the following reasons, to wit:

Said paper, or document, purports to contain the testimony at the trial and the instructions given the jury by the Court, and is manifestly intended as a bill of exceptions, but the same is not signed by the

Judge of the court below, or otherwise properly authenticated so as to become a part of the record on writ of error.

ARGUMENT ON MOTION.

It is difficult to understand what object the plaintiff had in having the papers, found in the transcript from pages 23 to 30, and from pages 247 to 282, sent up. Not being embodied in a bill of exceptions or otherwise authenticated by the Judge below, they are in no sense a part of the record in an Appellate Court, and are not reached by a writ of error which is directed to the record, viz., the judgment-roll, and such matters as are brought into the record by the bill of exceptions.

Duncan vs. Atchison T. & S. F. Ry. Co., 72 Fed. 808;

Sternenberg vs. Mailhas, 99 Fed. 43.

The paper entitled "Transcript of the Testimony, etc.," found on pages 33 to the middle of page 244, was evidently intended to answer the purpose of a bill of exceptions. But it is not signed by the Judge of the court below, as required by law. There is in the transcript an "order allowing, settling, and certifying bill of exceptions," and following the order, a "certificate to bill of exceptions" (R. 245–247). Each of these documents is filed separately (R. 33, 246 and 247).

"The signature of the Judge to an order (allowing and settling a bill of exceptions) did not constitute a signature to the bill of exceptions."

Dalton vs. Hazelett, 182 Fed., at p. 558.

STATEMENT OF THE CASE.

The condition of the record is such that we do not believe any of the questions raised, or attempted to be raised, by the plaintiffs in error, can properly be considered by this Court. Of the thirty-five assignments of error, four have been abandoned. The remaining thirty-one have been arranged in three groups, and three questions are argued in the brief. Before taking up these three contentions, we will briefly state the nature of the case, using the same terms to designate the parties as were used in the court below. We shall assume, without conceding it, that the paper entitled "Transcript of Testimony" is a bill of exceptions.

Plaintiff recovered a judgment against the defendants jointly and severally for personal injuries sustained by him while in their employ. From the admissions in the pleadings, the evidence, and verdict of the jury, the following facts are established:

1st. Plaintiff was in the employ of the defendants, both common carriers, at the time he sustained his injuries. (Defendant Katalla Company admits this as to it. Plaintiff testified he was in the employ of the Copper River & N. W. Ry. Co. (R. 47–49). His pay checks were countersigned by the Railway Co. officers (R. 183). The Katalla Company and the Railway Company appear to have been one and the same concern, and both were operating the railroad.)

2d. Plaintiff was seriously injured while in such employ, by the caving in of the tunnel in which he was at work.

3d. This cave-in was due to the negligence of the superintendent in charge of the work.

The way the accident occurred is correctly stated in the brief of the plaintiffs in error, with some important omissions which we add: Prior to the time that plaintiff left the tunnel work, some four or five days before the accident, Mr. Forrester, an employee of the defendant companies since April, 1908 (R. 224), and who had entire supervision of the work (R. 226), had had heavy braces put under each bent, reaching from the floor of the tunnel, on each side, to the middle of the roof, so as to strengthen it, while the new timbers were put in place (R. 113, 116, 182, 183). The last four bents he considered safe without these braces and did not have them put in (R. 229). On the morning of August 7, plaintiff, by order of his superior, returned to work in the tunnel, and almost on the instant he reached his place of work these unbraced bents fell, killing two men, and injuring others, plaintiff among them (R. 49–54).

I.

Defendants' first contention is—

1st. That there is no proof that plaintiff was in the employ of the Railway Company.

2d. That there is no proof that the Katalla Company was a common carrier. Hence, there is a fatal misjoinder of causes of action.

This question, it is contended, is raised by the 8th, 9th, 25th, 28th and 35th assignments. No such question was raised in the court below.

The 8th assignment, based on the refusal of the Court to grant a nonsuit as to both defendants, was

waived, by the introduction of evidence in defense, The motion is not, however, in any pretended bill of exceptions.

The 9th assignment is based upon the refusal of the Court to direct a verdict. The motion is not in any purported bill of exceptions, and cannot, therefore, be considered; but if it could, it was manifestly rightly overruled.

The 25th assignment is based upon the alleged refusal of instruction. There is absolutely nothing in the *record* to show that such instruction was ever asked or refused. There is in the Transcript two papers filed four days after the verdict was returned (R. 253–272), entitled, respectively, "Instructions requested by Copper River & N. W. Ry. Co.," and "Instructions requested by Katalla Co." These two papers are unsigned by anyone, and the *record* is silent as to whether they were ever presented to the Court or acted upon in any way. The purported exception to the purported refusal to give the instructions was taken, or rather purports to have been taken May 5th, nine days after verdict. (R. 275–277.)

The 35th assignment complains of the action of the Court in denying motion for new trial—a question never considered in a Federal Appellate Court.

So that not only was the question argued in the brief not raised in the court below, but it is not raised on the record in this court. But if it had been, the citation to those parts of the record we have made and will make show it could never have been successfully raised. (In addition to the evidence cited in

the statement *supra*, the record shows the Katalla Company was operating the railway as a common carrier. Testimony of Feldman, R. 195, Kinney, 120, Reily, 116, Plffs. Ex. "C" to "H," inclusive.)

II.

Defendants in their brief next group together assignments of error Nos. 8, 9, 10, 13, 14, 16–24, 26–35. We have already dealt with 8, 9, 28 and 35.

Under this group, defendants contend that the evidence wholly fails to show a cause of action against either defendant. Let us briefly examine the remaining assignments upon which it is sought to raise this question. Nos. 10 to 13, inclusive, complain of certain instructions. If the paper entitled "Transcript of Testimony, etc." (R. 33–244), can be considered a bill of exceptions, then there is no exception to any of the instructions complained of. If it is not a bill of exceptions, then the instructions are not in the record. In any event, these assignments cannot be considered. The remaining assignments under this group complain of the alleged refusal to give certain instructions. But as pointed out already, the record fails to show any requests for instructions, or at least until four days after verdict, or any exceptions, or at least any until nine days after verdict.

However, as we have already pointed out, there was abundant evidence to sustain the verdict.

III.

Defendants, in their brief, next group together assignments of error Nos. 5, 6, 7, 11, 12 and 28.

The first three complain of the admission in evi-

dence of the bills of lading issued by the Katalla Company operating the Copper River & N. W. Railway, and the testimony in connection therewith. Of these assignments it is sufficient to say that if there is any better evidence than that the Katalla Company was holding itself out as operating the railway, issuing bills of lading, and collecting freight money, to prove it was a common carrier, defendants have failed to suggest it in their brief. It is argued, however, that because the evidence was not confined to the very time of the accident, it was not pertinent. This objection was barely mentioned in the court below (R. 118) and not urged, or it might have been cured. Be that as it may, if the Katalla Company ceased to be a common carrier after May and before August 7, 1911, it would have been an easy matter for the defendants to have shown it. They offered no evidence whatever in this issue, and the jury rightly concluded it was a common carrier at all times during the year.

Assignments Nos. 11 and 12 complain of certain instructions. These assignments, as already pointed out, should not be considered.

No. 28 complains of the alleged refusal to give certain purported requests for instructions. We can add nothing to what has been said already as to these purported requests.

In conclusion we wish to say that the defendants had a fair trial in the court below; they apparently abandoned all hope of a complete defense, and sought merely to reduce damages. After verdict only did they seek to raise most of the questions they have

argued here. This is neither fair to the Court below, to this Court, nor to the defendant in error.

We respectfully ask that the judgment be affirmed.

J. H. COBB,

Attorney for Dan S. Reeder, Defendant in Error.